



REPUBLIC OF KENYA



**Walongo v Kirigha & 2 others (Civil Appeal E027 of 2022)
[2025] KEHC 5272 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E027 OF 2022
AN ONGERI, J
MARCH 19, 2025**

BETWEEN

EUNICE WALONGO APPELLANT

AND

CHRISTOPHER KIRIGHA 1ST RESPONDENT

PAUL MAKOHA 2ND RESPONDENT

ARK DEVELOPMENT 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon. C. L. Adisa (RM)
in Taveta MCC No. 8 of 2020 delivered on 4th July 2022)*

JUDGMENT

1. The Appellant filed Taveta CMCC No. 8 of 2020 seeking the following remedies:-
 - i. An order compelling the Respondents jointly to return her five goats, a tank and two plastic chairs which they took illegally.
 - ii. An order compelling the Respondents to produce an account of the proceeds of sale of the five goats, a tank and two plastic chairs and an updated loan statement.
 - iii. The costs and interest of the suit.
 - iv. Any other order or further relief the court might deem fit to grant.
2. The Appellant's evidence in summary was that she was a member of Rise and Shine group where she took loans through Ark Development Initiative (the 3rd Respondent).
3. On 11th October 2018 she was advanced a loan of Kshs. 40,000/= and she managed to pay back Kshs. 29,650/= leaving a balance of Kshs. 21,170/=.



4. Due to the harsh economic terms, she authorized the 3rd Respondent to deduct the balance from her shares which amounted to Khs. 18,800/= and she would pay Kshs. 2,370/= but they declined and they seized her goods but failed to offset the loan.
5. The Respondents said the Appellant had placed the items as security for the loan.
6. The trial court dismissed the Appellant's suit with costs to the Respondents.
7. The Appellant has now appealed to this court on the following grounds:-
 - i. The learned trial Magistrate erred in law and fact by reaching a finding that there is no requirement for issuance of notices before attachment and sale of security in recovering of the loan.
 - ii. The learned trial Magistrate erred in law and fact when she failed to make a finding that the items pledged as security were not the same as those that were attached and auctioned in recovering the loan taken.
 - iii. The learned trial Magistrate erred in law and fact by failing to conclude that the Respondents are obligated by law to provide the Appellant with a statement of accounts after attachment and sale of security.
 - iv. The learned trial Magistrate erred in law and fact when dismissed the Appellant's case despite conflicting witness testimony of the Respondents.
 - v. The learned trial Magistrate erred in law and fact when she failed to consider the Appellant arguments, submissions and authorities when arriving at his decision.
8. The parties filed written submissions as follows:-

The Appellant's submissions

 - a. The Appellant submitted that the trial court failed to reach a finding that the Appellant's savings were available as security for the loan advanced.
 - b. That the savings were sufficient to secure the loan and there was no justification by the Respondents to sell the properties before first using her savings.
 - c. The Appellant relied on the ELRC Cause No. 1430 of 2015 where the court said that the employer was still holding onto the employee's terminal dues and therefore they could not convert their loan to commercial rates.
 - d. The Appellant submitted that the loan taken was Kshs. 40,000/= to be repaid in 18 months at the rate of Kshs. 2,900/= per month and further that the Appellant only defaulted for 3 months and her goods were seized and sold.
 - e. Further, that no notice was issued before the security was taken away. The Appellant relied on Article 46(1) which states as follows:
 - f. The Appellant submitted that her rights are protected by Article 46 of *the Constitution* and further Section 65 – 67 of the Moveable Properties Act provides for enforcement of security rights and the secure credit as required to issuing notice in writing to the grantor notifying him of default and in default they may either sue the grantor or take possession of the moveable properties.



- g. The Appellant submitted that the items pledged as security were not the same ones sold. That the Appellant pledged a good, one cow and one bull but they took five goats, a water drum and chairs and that the said items were never pledged and they never became a commodity available for sale under Section 6 of the Moveable Securities Act.
9. The Respondents did not file any submissions.
10. This being a first appeal, the duty of the first appellate court is as stated in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the Court of Appeal held that:
- “The first appellate court has a duty to re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. The appellate court must subject the entire evidence to a fresh scrutiny and draw its own inferences. While the appellate court should consider the trial court’s findings, it is not bound by them and must form its own independent judgment”.
11. This is a first appeal from the judgment of Hon. C. L. Adisa (RM) in Taveta CMCC No. 8 of 2020 delivered on 4th July 2022. The Appellant, Eunice Walongo, filed the suit seeking orders for the return of her five goats, a tank, and two plastic chairs, which she alleged were illegally taken by the Respondents. She also sought an account of the proceeds from the sale of these items and an updated loan statement. The trial court dismissed her suit, prompting this appeal.
12. The issues for determination in this appeal are as follows:-
- i. Whether the Appellant proved her case to the required standard.
 - ii. Whether appeal should be allowed.
13. On the issue as to whether the Appellant proved her case to the required standard, I find that the Appellant’s case revolved around the alleged seizure and sale of her property by the Respondents.
14. She contends that the Respondents failed to issue a notice before attaching and selling her property, which she claims was not the same as the items she pledged as security for the loan. She also argues that the Respondents failed to provide her with a statement of accounts after the sale of the security.
15. However, there is evidence that the appellant was granted a loan which was in arrears when her property was seized and sold by the respondents.
16. DW2, Paul Makokha who was in the group that went to realize the security said the appellant pledged a cow and goats but they did not find the cow and further that it was the appellant who gave them the goats.
17. The Appellant relied on Article 46(1) of *the Constitution* of Kenya which protects consumer rights, and Sections 65-67 of the Moveable Properties Act, which require the issuance of a notice in writing to the grantor (the Appellant) notifying them of default before taking possession of the moveable properties. The Appellant argued that no such notice was issued.
18. However, the parties had not agreed on issuance of notices before attachment and sale of security in recovering of the loan.
19. I find that although the appellant alleged that there was a discrepancy between the items pledged and those sold, the Appellant did not produce evidence that the pledged items were available when the five goats, a tank, and two plastic chairs were seized.



20. Under Section 6 of the Moveable Properties Act, only the items pledged as security can be sold in the event of default and in the current case, the evidence on record was that it was the appellant who gave the goats and then she made a report that her goats had been stolen.
21. The appellant did not challenge the evidence by the respondents' witnesses that she gave them the goats.
22. On the issue of failure to provide a statement of accounts, the Appellant also contended that the Respondents failed to provide her with a statement of accounts after the sale of her property.
23. I have perused the record and there is evidence that the goats were sold for Ksh 9,000, the two plastic chairs for Ksh. 600 and the water tank for 1,000 making a total of Kshs. 10,600 which was not sufficient to clear the balance which was outstanding at the time of the default.
24. I find that the parties did not agree that the appellant's shares and savings be utilized to clear the loan in the event of default.
25. It is not the duty of the court to rewrite contracts between parties. In the case of *Puis Kimaiyo Langat Vs. Co-operative Bank of Kenya Ltd (2017) EKLR* the Court of Appeal stated as follows;

“We are alive to the hallowed legal maxim that it is not the business of the Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or under influence are pleaded and proved”
26. Again in the case of *National Bank of Kenya Ltd vs. Pipe Plastics Samkolit (K) Ltd (2002) 2.E.A. 503, (2011) EKLR*, the Court of Appeal at page 507 also stated as follows:

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or under influence are pleaded and proved.”
27. I find that the Trial court was right in dismissing the appellant's claim and I dismiss the appeal and uphold the Trial court's finding.
28. Each party to pay its own costs of this appeal.

DATED AND DELIVERED VIRTUALLY VIA MT AT VOI HIGH COURT THIS 19TH DAY OF MARCH 2025.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

